

AILA NorCal/San Francisco EOIR Liaison Questions and Answers

October 29, 2009

MASTER CALENDAR ATTORNEY SIGN-UP PROCESS

1. Can you clarify the current policy on the master calendar attorney sign-up process – in particular, how IJ's are to determine the order in which to call attorneys at master calendar hearings? (eg. (1) E28's on file in advance, (2) E28s filed day of (3) non-primary E28 filed day of (4) no E28 on file). One member reports that there does not appear to be uniformity in how the new policy is being implemented among various IJs.

Master calendar cases will now be called in the following order (also, please see response to question #4):

- *E-28s on file at least two business days in advance of the master calendar per the order listed in question #2 (an "on behalf of" attorney may step forward when the "primary" attorney's name is called)*
- *E-28s filed the day of the master calendar in order of receipt*
- *Pro se respondents*

Also, please remember that the assigned pro bono attorney may present the pro bono cases as well as any cases for which they are the attorney of record once s/he is ready to present the cases. This will interrupt the aforementioned order.

2. Is there any way to determine the order in which individuals are listed on the master calendar docket for a particular IJ, other than contacting the EOIR clerk in advance of the master hearing? When is the docket list for a master calendar hearing generated? Is it possible to make the docket list available online in advance of the master calendar hearing so that attorneys can plan their time accordingly? Some members are currently discouraged by long waits and the difficulty in accurately anticipating how long a hearing may take.

The Court's master calendar cases appear in the following order: 1) by time of hearing, 2) by the last 3 digits of the A#, and, 3) if there are multiple cases with the same last three digits, they then appear in order of the lowest first two digits. Morning master calendar cases are set at 8:30 (reset cases from previous masters), 9:00 (initial master cases with no previous hearing), and at 9:30 (expedited asylum referrals from the DHS Asylum Office). For example, if a case is scheduled at 8:30 and ends in "080" it will likely be at or near the top of the list. A case scheduled at 9:00 ending in "515" will be in the middle of the docket, and a 9:30 case ending in "950" will likely be at or near the bottom of the list. For the afternoon masters the same system applies, except the hearing times are at 1:00, 1:30, and 2:00.

The master calendar schedules are generated in the late afternoon the day before hearing and are posted first thing in the morning the day of hearing. At present, we do not have the ability to timely post master calendars online. The Court does not have direct access to modifying the Court's internet web site; rather, changes made to the website are submitted to the EOIR IT Department, which in turn reviews, approves, and then makes the changes.

3. How late in advance of a master calendar hearing can an attorney submit an EOIR-28 for it to be considered "on-file" for purposes of calling cases in master calendar hearings? A few members report submitting an EOIR-28 the day before a master hearing, but the E28 was not yet entered into EOIR's system, and thus the members ended up waiting for much longer than anticipated.

Per the July 31, 2009 notification to AILA and DHS, private attorneys are advised to file their E-28 at least two business days in advance of the master calendar.

*Cases will be called on the master calendar starting with attorneys who already have an E-28 on file with the court and whose name appears on the court's docket posted in the waiting room, starting at the top and working down the docket. **Private bar attorneys are urged to file E-28s at least two business days prior to the master calendar to ensure their name appears on the posted docket. E-28s filed at the front window the day before or the day of the master calendar will not appear on the posted docket.***

The Court has been able to ensure that E-28s filed two business days in advance of the master calendar are entered in the system and appear on the docket. Depending on daily workloads, on some occasions the Court has also been able to process E-28s filed the day before the master calendar, but private bar attorneys are advised that they should not rely on an E-28 filed within the two business day window appearing on the posted master calendar.

4. If an attorney has already entered an EOIR-28 for an individual, but another attorney will be appearing on their behalf the day of the master only, does the "non-primary" attorney need to submit an EOIR-28 in advance of the master calendar hearing to avoid being treated as a same-day entry of appearance? Or can the "non-primary" attorney submit their E-28 the day of the master hearing?

An attorney appearing "on behalf of" another attorney whose E-28 is already on file, may step forward and present the case when the "primary" attorney's name is called. An E-28 from the "on behalf of" attorney need only be filed at the master calendar when the case is called. Please ensure the E-28 clearly indicates the "on behalf of" appearance.

If the "primary" attorney does not already have an E-28 on file, the "on behalf of" attorney will need to submit both his/her E-28 and the "primary" attorney's E-28 at the master

calendar and await their name being called after the cases of attorneys with E-28s previously filed are heard. Of course, all changes in counsel are subject to the discretion of the judge.

5. Is EOIR open to suggestions for changing the current master calendar attorney sign-up process?

Some members suggest implementing the same process used in a few other EOIR locations currently. Specifically, the sign-up sheet for an IJ's master docket is controlled by that judge's clerk and only made available for attorney sign-up, in the Court, 10 minutes before master hearings begin. The member suggests that this way, only attorneys sign up.

The Court will always consider any suggestions provided to the Court for improving the efficiency of court operations. Suggestions should be made in writing and sent to the attention of Maria Jauregui, Court Administrator. The court has already considered the aforementioned suggestion but decided against its implementation because the court staff do not know all of the hundreds of attorneys that appear before us and would not be able to ensure that only attorneys are signing the sheet. The Court fears that the problems that precipitated the master calendar sign in changes would simply transfer to the courtroom itself rather than just the waiting room.

6. Is there any way to allow for online attorney sign-up for master calendar hearings only?

The Court does not currently have the technological resources to consider this suggestion.

OTHER

7. What is the proper procedure for entering an appearance as a non-primary attorney in a case?

For example, where Attorney A has already filed an EOIR-28, and wishes to remain the primary attorney of record on the case, but Attorney B will appear on their behalf at a single hearing - Should Attorney B submit an EOIR-28 in advance of the hearing indicating they are the "Non-Primary" attorney? Or submit the completed EOIR-28 at the time of their appearance? One member reports that her clearly marked, "non-primary" E-28 was rejected by the Court because there was already an attorney of record and no motion to substitute was filed.

In response to this question, and due to the recently updated E-28 released by EOIR, the Court will now accept E-28s indicating a "non-primary" or an "on behalf of" attorney without a motion to substitute counsel. Please ensure the E-28 is clearly marked to indicate this information.

8. For cases referred to EOIR from the SF Asylum Office, at least one IJ takes the position that where the NTA alleges no specific date of entry (DOE), there is no clear and convincing evidence of Respondent's DOE, and thus sets the case for a withholding only hearing. While the Respondent can attempt to prove his DOE under REAL ID at the individual hearing, this deprives referred asylum applicants of the ability to expedite their cases. What is the authority for treating the case as withholding only by an IJ based solely on the NTA allegations of no DOE? Is it correct, or appropriate, to have IJ's summarily deciding this issue (proof of DOE and whether one year filing has been met) at the initial master calendar hearing? In other words, is this a correct application of the burden of proof at the correct juncture? Finally, if only one IJ takes this position, is this not in conflict with the desired uniformity of procedure under the Immigration Court Practice Manual?

This question raises issues that are best addressed on a case-by-case basis and should therefore be raised before the judge in a particular case.

9. Is EOIR aware of a change in policy by local USCIS that restricts, or limits, when a Respondent in proceedings can be fingerprinted at an ASC location? At the September 10, 2009, AILA/SFCIS meeting, Robin Barrett, CIS Field Office Director indicated that due to budget constraints, a Respondent in proceedings would not be accepted for fingerprinting at an ASC location unless within 2 months of the next hearing date. Are IJ's informing Respondent's of this change in policy, and thus the shorter window in which to take their fingerprints? Assuming fingerprints cannot be taken more than 2 months before a hearing, what is the latest an applicant should get his fingerprints taken to avoid being pretermitted?

The Court has confirmed the new fingerprint policy change with CIS. The Court will inform the judges of this change to ensure that appropriate instructions are given to the respondents in Court, but we suggest that AILA seek guidance from the Office of Chief Counsel on the latest date a respondent should get fingerprinted as they are the appropriate agency to address this issue.

10. Once the asylum clock is stopped due to an alien-caused delay, will the clock restart if the IJ reschedules the individual hearing? For example, a Respondent requests a continuance in order to obtain legal counsel, thereby stopping the asylum clock. They subsequently obtain legal counsel and prepare for the scheduled individual hearing, but weeks prior to the hearing, are notified by the IJ's clerk that the individual hearing will be rescheduled for nine months in the future by the Court. As this nine month delay is not caused by the alien, shouldn't the asylum clock be restarted? If so, would it restart the day the IJ rescheduled the hearing or the day the individual hearing was originally scheduled?

Questions regarding the asylum clock are highly fact-specific. If a party feels that the asylum clock should be restarted in a specific case, attorneys should contact Maria Jauregui,

Court Administrator. This can be in the form of a phone call (415-705-4415 ext 237), email (maria.jauregui@usdoj.gov) or sending her a letter regarding the clock issue.

11. According to the Immigration Court Practice Manual 2.3(d), an “attorney has an obligation to continue representation until such time as the alien terminates representation or a motion to withdraw or substitute as counsel has been granted by the Immigration Court.” However, what is an attorney’s obligation where the IJ does not rule on either a pending motion to withdraw by Attorney A or motion to substitute-in new counsel by Attorney B, but subsequently grants Attorney B’s motion to change venue? Has an effective withdrawal of Attorney A been effectuated? What is the proper procedure for verifying withdrawal of Attorney A in this situation? Given that attorneys are required under the Practice Manual to submit, and have granted, a motion to withdraw before being released as counsel, one member asks aren’t IJ’s obligated to rule on all motions filed?

Until a motion to withdraw is granted, attorneys should assume they are still considered the attorney of record. Attorneys in this situation may contact the judge’s clerk to bring the pending motion to the court’s attention. If that is not successful, attorneys are welcome to contact the Court Administrator or ACIJ for San Francisco.